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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/933,709	08/22/2001	Charles A. Morris	1533.0520001	6249

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EXAMINER	
KISHORE, GOLLAMUDI S	
ART UNIT	**PAPER NUMBER**
1615	

DATE MAILED: 04/15/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/933,709	MORRIS ET AL.	
	Examiner	Art Unit	
	Gollamudi S. Kishore, Ph.D	1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *29 March 2004*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *18-47* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *18-47* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

HC

DETAILED ACTION

The filing of RCE dated 3-29-04 is acknowledged.

Claims included in the prosecution are 18-47.

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 18-47 are rejected under 35 U.S.C. 103(a) as being unpatentable over US Patent 4,603, 143 to Schmidt (US t 143).

US 143 discloses vitamin active powders, which are more free flowing and stable than conventional vitamin powders. US t 143 teaches that the composition comprises at least one fat- soluble vitamin material and a silicon containing material (c 1, 1 38 45). US $ 143 also teaches that the vitamin be vitamin E, and further explains that vitamin E comprises a group of natural substances known as tocopherols (c 2, l 55-57). It is the position of the examiner that this disclosure reads on applicant's claim to mixed tocopherols. Furthermore, 143 teaches that the silicon dioxide used in their composition has a density of around 0.2 g/cc (which is equivalent to 12.5 lbs./cu. ft.), and a particle size which passes through a 100 mesh sieve (col. 4, lines 61-62). (A 100-mesh sieve allows only particles, which are smaller than 150 microns to pass through). Thus,

although 143 does not teach the specific particle size for the silica, as claimed by applicant since it teaches particles smaller than 150 microns it is the position of the examiner that the determination of a particular particle sizes from within a broad range is within the skill of the ordinary worker as part of normal optimization. Additionally, 143 does not teach the surface area of the silica. However, the burden is shifted to applicant to show that the silica disclosed by 143 does not possess the same characteristics as the silica claimed by applicant.

Lastly, 143 does not specifically use the language mixed tocopherols in describing the vitamin to be used in their composition. However as discussed before, 143 does teach that vitamin E is a group of natural substances known as tocopherol, and it further teaches that vitamin E can be used as the vitamin of the disclosed composition. Applicant admits in his own specification that vitamin E is a mixture of different molecular species, including d-alpha, d-beta, d-gamma, and d-delta, which vary based on the natural variation of the oil (applicant's specification, p 3, l 24-27). Lastly, the reference does not specifically discuss stability. However, it is the position of the examiner that absent evidence to the contrary, the formulation must provide appropriate stability, or it would be useless for its intended purpose. Furthermore, The Office does not have the facilities for examining and comparing applicant's product with the product of the prior art in order to establish that the product of the prior art does not possess the same material structural and functional characteristics of the claimed product. In the absence of evidence to the contrary, the burden is upon the applicant to prove that the claimed products are functionally different than those taught by the prior

art and to establish patentable differences. See Exparte Phillips, 28. U.S.P.Q.2d 1302, 1303 (PTO Bd. Pat. App. & Int. 1993), Exparte Gray', 10 USPQ 2d 1922, 1923 (PTO Bd. Pat. App. & Int.) and In re Best, 562 F.2d 1252, 195 USPQ 430 (CCPA I 977). Therefore, it is the position of the examiner that based upon applicant's own admission, the disclosure in US & 143 teaching the use of vitamin E suggests the limitations of the instant claims. One of ordinary skill in the art would have been motivated to make a vitamin composition comprising vitamin E and silica. The expected result would be a free-flowing, fat- soluble vitamin powder with improved stability. Therefore, this invention as a whole would have been prima-facie obvious to one of ordinary skill in the art at the time the invention was made.

Applicant's arguments have been fully considered, but are not found to be persuasive. Applicant argues that Schmidt teaches away from the claimed invention and the claimed silica particle size and therefore, cannot form the basis of a prima facie obviousness rejection. In support applicant points out to col. 2, lines 14-19 of Schmidt. These arguments are not persuasive since at the location pointed out by applicant, Schmidt teaches the particle sizes of agglomerates and not those of silica; instant claims do not recite any particle sizes for the composition. Applicant's arguments based on Table 1 data in Schmidt are not found to be persuasive (page 10 middle paragraph of response). According to the table 1, 8.8 percent of HI-SIL 213 (silicon Dioxide) is retained on the sieve with mesh size 100. That means 91.2 percent of HI-SIL passes through contrary to applicant's calculations. Applicant argues that the examiner misinterpreted the results of Schmidt's Example 1. The examiner disagrees and as

pointed out before, lines 61-62 on the same column show that only 9.1 percent is retained on 100 mesh sieve which means 90.9 % flows through 100 mesh which in turn indicates particles of diameter less than 150 microns. Even assuming that this assumption is incorrect, the examiner points out that the values as taught on col. 4, lines 61 et seq. pertain the finished product and not for silica. Applicant's arguments based on the declaration by Charles Morris have been addressed before. Based on the data in the declaration, applicants assert that it provides support for this assertion because the silica outside the 40 to 50 micron size range produced vitamin powders which were chunky and gritty instead of free flowing. The examiner points out to Applicant that the data presented in the declaration does not clearly support the claimed range of 40 to 50 microns. The data provided shows several particle sizes up to 16 microns, one data set at 50 microns, and one data set at 100 microns. This data does not conclusively demonstrate that the unexpected results occur within 40 and 50 microns. The data in the declaration is not commensurate in scope with the claims. Furthermore, since prior art teaches that the powders obtained are stable and free flowing, a proper comparison would have been between instant product and the product taught by the prior art.

1. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not

mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gollamudi S. Kishore, Ph.D whose telephone number is (571) 272-0598. The examiner can normally be reached on 6:30 AM- 4 PM, alternate Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thurman K. Page can be reached on (571) 272-0602. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Gollamudi S Kishore, Ph.D
Primary Examiner
Art Unit 1615